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LION ASIA INVESTMENT PTE LTD

v.

ATELIER ADT INTERNATIONAL CONSULTANTS LTD & ANOR

b

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO. R2-24-29-2001]
17 JULY 2001

c

ARBITRATION: *Arbitrator - Question of law to be determined by court - Architectural and engineering services - First defendant not registered under Architects Act 1967 and Registration of Engineers Act 1967 - Illegality of first defendant's claim for fees - Whether question of law clear - Whether can be stated as point of law - Whether open to serious argument - Whether point of law important for resolution of parties' dispute - Whether point of law*

d

raised bona fide - Whether plaintiff has fulfilled requirements of s. 22 of the Arbitration Act 1952 - Contracts Act 1950, s. 24(a), (b)

The plaintiff, by originating summons and pursuant to s. 22 of the Arbitration Act 1952, applied to have certain questions that arose in the arbitration proceedings between the plaintiff and the first defendant determined by this

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court. The facts were that the plaintiff and the first defendant had entered into a contract where the first defendant was to provide architectural and engineering services for various projects ('the projects'). The first defendant engaged other parties to actually carry out these said services. Subsequently, the first defendant claimed for payment of these said services in the arbitration

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proceedings ('the proceedings').

At the outset of the proceedings, the plaintiff requested the arbitrator, ('second defendant') to state a case on the issue of the legality of the first defendant's claims for fees which the second defendant refused to do. The plaintiff

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informed him by letter that it intended to have this issue determined by the High Court on a case stated application at the appropriate time. The plaintiff made the present application soon after the close of evidence in the proceedings. The plaintiff's originating summons raised a clear issue: Can the first defendant, as an entity not registered under the Architects Act 1967 or the Registration of Engineers Act 1967, claim remuneration or fees in respect

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of architectural or engineering services?

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Held:

[1] The plaintiff must first have asked the learned arbitrator to state a case for the decision of the High Court and he has refused to do so. This requirement has been satisfied. (p 92 d)

[2] It was not disputed that the first defendant was not registered under the Architects Act 1967 or the Registration of Engineers Act 1967. Sections 7 and 7A of the Architects Act 1967 and ss. 7 and 7A of the Registration of Engineers Act 1967 require an entity claiming fees for engineering services to be registered under the respective statutes. This issue is a point of law because it involves statutory interpretation. (p 95 h)

[3] Whichever scenario this court accepts in the final analysis it will have important repercussions in this instant case as well as on the engineering and architectural professions in general as it will judicially explain the express or implied prohibition on the recovery of fees in the Architects Act 1967 and the Registration of Engineers Act 1967. Hence, the questions in the plaintiff's originating summons, by raising the issue of the legal basis of the illegality of the first defendant's claims for fees, clearly raised a serious point of law for argument in this court. (p 98 d-e)

[4] Although there is case law to say that the first defendant's claims for fees cannot be maintained, the courts have not been clear on which provision in s. 24 of the Contracts Act 1950 prohibits such a claim. The basis of this prohibition is a matter that is open to serious argument and should be resolved by the High Court. This issue also involves matters of public policy that are best involved by the High Court and not left to be decided by a single arbitrator. (p 99 d)

[5] The resolution of this point of law is important for the arbitration proceedings. If this court decides that the first defendant's claim for fees cannot be maintained, then the first defendant's claims in the arbitration proceedings must necessarily fail. (p 99 e)

[6] The point of law raised by the questions in the originating summons is raised *bona fide*. The plaintiff always maintained that this point of law on the legality of the first defendant's claims should be a matter to be determined by the High Court on a case stated application pursuant to s. 22 of the Arbitration Act 1952. The plaintiff has fulfilled the requirements of s. 22 of the Arbitration Act 1952. (p 99 f)

[Originating summons allowed with costs.]

Case(s) referred to:

BEP Arkitek (Pte) v. Pontiac Land Pte Ltd [1992] 1 SLR 251 ***(refd)***

Halfdan Grieg & Co v. Sterling Coal & Navigation Corporation & Anor [1973] 1 QB 843 ***(refd)***

John B Skilling & Ors v. Consolidated Hotels Ltd [1979] 2 MLJ 2 ***(refd)***

Raymond Banham & Anor v. Consolidated Hotels Ltd [1976] 1 MLJ 5 ***(refd)***

RS Hartley Ltd v. Provincial Insurance Co Ltd [1957] 1 Lloyd's Rpt 121 ***(refd)***

Sagabumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 MLJ 151 ***(refd)***

Shencourt Sdn Bhd v. Arab-Malaysian Toda Construction Sdn Bhd & Anor [1998] 7 MLJ 473 ***(foll)***

The Government of Malaysia (JKR Sarawak) v. Lau Tiong Ik Construction Sdn Bhd [2001] 5 MLJ 629 ***(refd)***

The Government of Sarawak v. Sami Mousawi – Utama Sdn Bhd [2000] 7 CLJ 228 ***(refd)***

Yee Hoong Leong Corp Sdn Bhd v. Kwong Fook Seng & Co [1993] 1 CLJ 90 ***(foll)***

Legislation referred to:

Arbitration Act 1952, s. 22

Architects Act 1967, ss. 2, 7(1), 7A(1), 10(2)

Contracts Act 1950, s. 24(a), (b)

Registration of Engineers Act 1967, ss. 2, 7(1), 7A(1), 10(2)

Other source(s) referred to:

Mustill & Boyd, *The Law and Practice, Commercial Arbitration in England*, 2nd edn, p 694

For the plaintiff - CF Lim (R Yatiswara & Annbel Chua); M/s Azman, Davidson & Co

For the defendant - N Chandran (Ranjan Chandran & G Gunaseelan); M/s G Gunaseelan & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Faiza Tamby Chik J:

The originating summons in the instant case concerns the plaintiff's application to have certain questions that have arisen in the arbitration proceedings ('the arbitration proceedings') between the plaintiff and the first defendant determined by this court. The second defendant is the arbitrator in the arbitration proceedings. These arbitration proceedings concern:

(a) A claim by the first defendant against the plaintiff for architectural and engineering services; and

(b) A counterclaim by the plaintiff against the first defendant for recovery of overpayments in respect of architectural and engineering services provided by the first defendant to the plaintiff and/or other companies;

(c) A counterclaim by the plaintiff against the first defendant to recover monies paid to the first defendant pursuant to certain illegal contracts.

The instant application is made pursuant to s. 22 of the Arbitration Act 1952. If this court decides that the questions of law raised by the present application are appropriate for its determination pursuant to s. 22 of the Arbitration Act 1952 a two stage process will then occur:

(a) Firstly, this court will direct the learned arbitrator to "state a case" on those questions raised in the instant application for the determination of the court. This will mean that the arbitrator will be asked to make findings of fact that will be necessary for this court to make a determination on the said questions of law. There are a number of criteria that the High Court will consider when deciding whether to direct an arbitrator to state a case pursuant to s. 22 of the Arbitration Act 1952.

(b) Secondly, once the arbitrator has made findings of fact that are necessary to make a determination on the questions of law, the arbitrator will submit these facts to this court. This court will then proceed to make a determination on the question of law.

It may be observed from the abovementioned that both the arbitrator and the High Court play a role in an application under s. 22 of the Arbitration Act 1952. The arbitrator determines the facts whereas the High Court provides answers to the question of law raised by the application. See *The Government of Malaysia (JKR Sarawak) v. Lau Tiong Ik Construction Sdn. Bhd.* [2001] 5 MLJ 629 at p. 635, where the court stated:

> It is the duty of the arbitrator to sift through the case, identify the facts and then frame the question of law that is to be referred to court. It is not the duty or function of this court to go through the voluminous records and documents of the case to determine the facts and the law that is to be decided. This Court could not usurp the role and function of an arbitrator.

In this regard Lord Goddard CJ, in *RS Hartley Ltd v. Provincial Insurance Company Ltd.* [1957] 1 Lloyd's Rpt 121 had this to say:

> I do not know what facts the arbitrator found or what the facts of the case are. I do not think I am entitled to look at the affidavits because it is for the arbitrator to find the facts and not for the court to do so. The court has no right to find the facts unless the arbitrator or the parties state a case. But the parties have gone to arbitrator, and it's the arbitrator to find the facts.

The principal background facts that give rise to the instant application (as set out in the various affidavits filed herein) are not disputed. These facts are as follows: The first defendant is a company that was incorporated in Hong Kong on or about 23 March 1993. Its registered office is in Hong Kong. (See para. 12 of Ong Chow Meng's affidavit affirmed on 17 May 2001). The first defendant's name was originally Siu Wing International Ltd. However, this name was changed to Atelier ADT International Consultants Ltd. on or about 7 October 1993 when the directors of a Malaysian architectural consultancy firm called Atelier ADT Akitek Sdn. Bhd. purchased the first defendant in or around August 1993.

These directors of Atelier ADT Akitek Sdn. Bhd. are Mr. Siew Kwok Hong, Mr. Ho Kien Keong and Mr. Chong Chen Kian (see paras. 12 and 13 of Ong Chow Meng's affidavit affirmed on 17 May 2001). Although they purchased the first defendant in October 1993, the directors of Atelier ADT Akitek Sdn. Bhd. did not become the directors of the first defendant. They merely become shareholders of the first defendant. The directors of the first defendant are two Hong Kong companies called Tapman (Nominees) Limited and Chrisanda (Nominees) Limited. (see para. 14 of Ong Chow Meng's affidavit affirmed on 17 May 2001.) Clause 3(11) of the first defendant's Memorandum of Association provides that it may carry on the business of consulting engineers and "provide architectural, design and other consultancy services of all kinds" (see para. 15 and p. 131 of exh. "A6" Ong Chow Meng's affidavit affirmed on 17 May 2001). Although the first defendant is empowered by its memorandum of association to provide engineering and architectural services, it is not an entity that is registered under the Architects Act 1967 and the Registration of Engineers Act 1967. When the Lion Group of companies decided to carry out various projects in China (hereinafter referred to as 'the China projects') it consulted Atelier ADT Akitek Sdn. Bhd. (See para. 19 of Ong Chow Meng's affidavit affirmed on 17 May 2001). It was envisaged that a part of the work on the China projects would be carried out in Malaysia. The work to be done in Malaysia consisted of, *inter alia*, part of the architectural and engineering design for the China projects and advice to the Lion Group on architectural and engineering matters pertaining to the said projects. Prior to September 1993 Atelier ADT Akitek Sdn. Bhd. used its employees and independent Malaysian engineering consultants to carry out the portion of the architectural and engineering work on the China projects required to be done in Malaysia. Sometime in September 1993, Atelier ADT Akitek Sdn. Bhd. decided to use the first defendant to provide the engineering and architectural services for the China projects (see para. 19 of Ong Chow Meng's affidavit affirmed on 17 May 2001), including the portion of the works to be performed in Malaysia. This is confirmed by the first defendant's own

witnesses in the arbitration proceedings. These witnesses gave evidence to the effect that, although they were engaged by the first defendant, the majority of their services were still rendered in Malaysia (see para. 20 and exh. "A7" in Ong Chow Meng's affidavit affirmed on 17 May 2001).

A further point of importance to note is that there were no dealings, meetings or correspondence with the first defendant on the China projects. These matters were dealt with by Atelier ADT Akitek Sdn. Bhd.'s office in Jalan Kelang Lama. In short, no work was done on the China projects by the first defendant. (See paras. 18 and 24 of Ong Chow Meng's affidavit affirmed on 17 May 2001). Paragraph 7 of Siew Kwok Hong's affidavit affirmed on 5 June 2001 on behalf of the first defendant also confirms that:

(a) The first defendant was engaged to provide architectural and engineering consultancy services on the China projects; and

(b) The first defendant engaged other parties to actually carry out these architectural and engineering services.

These undisputed facts will be among the facts to be stated by the learned arbitrator to this court in the form of an interim award if this application is allowed by this court. Although the first defendant claims to have engaged other parties to actually carry out these architectural and engineering services for the China projects, it is the party claiming the payment for these services in the arbitration proceedings before the second defendant. As mentioned earlier the first defendant is not registered under the Architects Act 1967 or the Registration of Engineers Act 1967. At the outset of the arbitration proceedings the plaintiff was of the view that the first defendant could not maintain its claim for fees for architectural and engineering services as it was not an entity registered under the Architects Act 1967 or the Registration of Engineers Act 1967. This issue involved an important matter of law and public policy as it involved a judicial determination on the scope and policy of ss. 7 and 7A in the Architects Act and ss. 7 and 7A in the Registration of Engineers Act 1967. The plaintiff requested the second defendant to state a case on the issue of the legality of the second defendant's claims in the arbitration proceedings for the determination of the High Court pursuant to s. 22 of the Arbitration Act 1952. This request was made to the second defendant as early as October 1998, before the second defendant proceeded to hear evidence in the arbitration proceedings. (See para. 14 of Ong Chong Meng's affidavit in reply affirmed on 27 June 2001). In a decision dated 21 May 1999, the second defendant refused to state a case on the validity of the first defendant's claim for the determination of the High Court pursuant to s. 22 of the Arbitration Act 1952. In his decision the second defendant acknowledged that the plaintiff's request for him to state a case was made at the commencement of the reference to

arbitration in October 1998 (see exh. "A12" at p. 291 of Ong Chow Meng's affidavit affirmed on 17 May 2001). Soon after the second defendant's refusal to state a case pursuant to s. 22 of the Arbitration Act 1952 the plaintiff wrote to him to say that it reserved the right to apply to the High Court to direct him to state a case in this matter when all the relevant evidence in the arbitration proceedings had been adduced (see exh. "A13" at p. 294 of Ong Chow Meng's affidavit affirmed on 17 May 2001). The most appropriate time to make this application was after all the evidence in the arbitration proceedings had been recorded. All the evidence in the arbitration proceedings was recorded in April 2001. The present application was filed soon thereafter in May 2001.

It must be borne in mind that in making the present application pursuant to s. 22 of the Arbitration Act 1952, the plaintiff must satisfy the following requirements:

(a) The plaintiff must first have asked the learned arbitrator to state a case for the decision of the High Court and he has refused to do so. This requirement has been satisfied;

(b) "the question of law on which the court's opinion is desired is material to the issues between the parties, and, having regard to all the circumstances of the case is such as should be determined by the court". In this context the High Court will consider if:

(i) the question of law is clear and can be accurately stated as a point of law;

(ii) the point of law is open to serious argument;

(iii) the point of law is important for the resolution of the parties' disputes; and

(iv) the point of law is raised by the applicant *bona fide* and without any ulterior motive.

In *Shencourt Sdn. Bhd. v. Arab-Malaysian Toda Construction Sdn. Bhd. & Anor.* [1998] 7 MLJ 473 at p. 478 Steve Shim J (as he then was) said:

> The Court will not direct an arbitrator to state a special case unless: (a) the applicant has, in the first instance, requested him to state a case and the request has been refused; and (b) the question of law on which the court's opinion is desired is material to the issues between the parties, and, having regard to all the circumstances of the case, is such as should be determined by the court. The court's power to direct is discretionary. Certain guidelines have been established in exercising such a discretion. They are as follows: (1) the question

of law must be clear cut and capable of being accurately stated as a point of law; (2) it must be a point of law which is open to serious argument; (3) it must be substantial in the sense of being important for the resolution of the dispute; and (4) it must be raised *bona fide* and not for some ulterior motive (see *Halfdan Greig & Co. A/S v. Sterling Coal & Navigation Corp* 1 Lloyd's Rep 296; [1973] 1 QB 843 (CA)). However, there may be other circumstances in which the court will refuse to order a special case even when the above requisites are satisfied (see *Bornholm (Ewners) v. Exporthleb, Moscow* [1973] Lloyd's Law Rep 59).

In *Yee Hoong Leong Corp Sdn Bhd v. Kwong Fook Seng & Co* [1993] 1 CLJ 90 at p. 91, Peh Swee Chin SCJ said:

The learned Arbitrator refused to so state a special case as applied for by the developer before the former, who then applied for an order directing him to do so to the High Court.

The question before the Court was whether the learned Arbitrator had correctly exercised his discretion in so refusing. What are the principles or conditions which the learned Arbitrator ought to consider when he exercised such discretion?

In *Halfdan Greig & Co. v. Sterling Coal & Navigation Corpn.* [1973] All ER 1073, the Court of Appeal (Lord Denning, M.R., Megaw and Scarman LJJ) set out three conditions which have to be fulfilled before a similar request can be granted by an arbitrator. They are:

(1) that the point of law must be real and substantial;

(2) the point of law should be capable of being accurately stated as a point of law; and

(3) the point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.

In *Halfdan Grieg & Co. v. Sterling Coal & Navigation Corporation & Anor.* [1973] 1 QB 843 at p. 862 Lord Denning M.R. said:

When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites:

The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law: see *In re Nuttall and Lynton and Barnstaple Railway Co.* [1899] 82 LT 17 – as distinct from a point which is dependent on the special expertise of the arbitrator or umpire: see *Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekgringeen* [1962] 2 Lloyd's Rep. 257.

The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.

If those three requisites are satisfied, the arbitrator or umpire should state a case.

In Mustill & Boyd *"The Law and Practice, Commercial Arbitration in England"* 2nd edn, at p. 694 the writers noted:

A. DUTY TO STATE A CASE

Under section 21(1) of the Act, the Court has power to direct the arbitrator to state a special case for the Court's decision. This power is discretionary. The Court will not automatically direct the arbitrator to state a case whenever a question of law arises for decision. But the general principles governing the exercise of the discretion are now reasonably well established:

1. The question of law must be clear cut and capable of being accurately stated as a point of law. It must not be merely a matter of fact dressed up as a point of law.

2. It must be a point of law which is open to serious argument.

3. It must be substantial in the sense of being important for the resolution of the dispute. The fact that it does not raise any issue of general importance is immaterial so long as the issue is of importance to the parties themselves.

4. It must be raised *bona fide* and not for some ulterior motive, such as delaying the day when a final award is made.

The requirement of *"bona fides"* is an additional requirement imposed by the decision in *Shencourt Sdn. Bhd. v. Arab-Malaysian Toda Construction Sdn. Bhd. & Anor*. It is recognised by Mustill & Boyd.

I think the key provisions of the Architects Act 1967 that are relevant to the instant application are:

(a) Section 2 which defines an "Architect" to mean a person registered under s. 10(2);

(b) Section 7(1) which provides that:

No person shall unless he is an Architect:

(a) practice or carry on business or take employment as an architect;

(b) Section 7A(1) which provides as follows:

7A. Architectural practice by bodies corporate.

(1) Notwithstanding section 7(1), a body corporate may practise as architects and recover in any court any fee, charge or remuneration for any professional advice or services rendered by it pursuant to its practice as architects carried on by virtue of this section, if it has the written approval of the Board to so practise and has been issued with a valid permit in respect thereof.

And the key provisions in the Registration of Engineers Act 1967 that are important to the instant application are:

(a) Section 2 which defines a "registered Professional Engineer" as a person registered under s. 10(2). Section 2 also defines an "Engineer" to mean "a Civil Engineer, Electrical Engineer, Mechanical Engineer or Structural Engineer or other person qualified to be registered under this Act;

(b) Section 7(1)(a) which provides that "No person shall unless he is a registered Professional Engineer:

(a) practise, carry on business or take up employment as an Engineer";

(c) Section 7A(1) which provides as follows:

7A.(1) Notwithstanding s. 7(1), a body corporate may practise as consulting engineers and recover in any court any fee, charge or remuneration for any professional advice or services rendered by it pursuant to its practice as consulting engineers carried on by virtue of this section, if it has the written approval of the Board to so practise and has been issued with a valid permit in respect thereof.

In the instant case it is not disputed that the first defendant is not registered under the Architects Act 1967 or the Registration of Engineers Act 1967. Sections 7 and 7A of the Architects Act 1967 and ss. 7 and 7A of the Registration of Engineers Act 1967 require an entity claiming fees for engineering services to be registered under the respective statutes. In the light of the statutory framework of both the Architects Act 1967 and the Registration of Engineers Act 1967, the questions set out in the plaintiff's originating summons raise a clear issue on the interpretation of the said Acts. This issue can be summarised as follows:

> Can the First Defendant, as an entity not registered under the Architects Act 1967 or the Registration of Engineers Act 1967, claim remuneration or fees in respect of architectural or engineering services?

This issue is a point of law as it involves matters of statutory interpretation. The first defendant has attempted to argue in its various affidavits in the present case that it has satisfied the requirements of the Architects Act 1967 and the Registration of Engineers Act 1967 by engaging registered architects and engineers to carry out the architectural and engineering work on the China projects. It, therefore argues that its non-registration under both Acts is not an issue that prevents it from recovering fees for the said architectural and engineering work. Although this should properly and only be argued at the case stated hearing if the present application is allowed, this argument nonetheless cannot be accepted in the light of the recent High Court decision in *The Government of Sarawak v. Sami Mousawi-Utama Sdn. Bhd.* [2000] 7 CLJ 228 where Ian Chin J considered the provisions of ss. 7 and 7A of both the Architects Act 1967 and the Registration of Engineers Act 1967. He concluded that a corporate entity cannot claim fees for architectural or engineering services if it is not registered under both Acts even if it uses registered professionals to provide these services and said at p. 248:

> In this regard *BEP Akitek (PTE) v. Pontiac Land Pte Ltd* [1992] 2 SLR 251 more to the point and it supports the contention that assuming that the claimant had merely undertaken to provide the professional services which were done by registered professionals, nevertheless the fees are not recoverable.

In *BEP Arkitek (Pte) v. Pontiac Land Pte. Ltd.* [1992] 1 SLR 251, it was held that an entity was not registered under the relevant Singapore statute cannot claim fees for architectural services even if it engages registered professionals to perform those services. In *Raymond Banham & Anor v. Consolidated Hotels Limited* [1976] 1 MLJ 5, Winslow J held:

> (3) services performed by the plaintiffs under the aforesaid contract were therefore illegal in that the plaintiffs never took steps to get themselves registered beforehand nor to engage in such services under the direction or supervision of a registered professional engineer;

In *John B Skilling & Ors v. Consolidated Hotels Ltd.* [1979] 2 MLJ 2, it was held that the Professional Engineers Act of Singapore precluded the recovery of fees for engineering services by engineers not registered under the said Act. Section 24 of the Contracts Act 1950 provides:

> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

I am of the view that in the instant case it is important for this court to decide if the first defendant's claim for fees and remuneration falls foul of s. 24(a) or (b) of the Contracts Act 1950. In other words, it is important for this court to determine if the first defendant's claim for fees:

(a) is expressly forbidden by the Registration of Engineers Act 1967 and the Architects Act 1967 and, therefore falls foul of s. 24(a) of the Contracts Act 1950; or

(b) if permitted, would defeat the purpose of the Registration of Engineers Act 1967 and the Architects Act 1967 and, therefore fall foul of s. 24(b) of the Contracts Act 1950.

I think a determination by this court on this issue is important for the plaintiff and first defendant and architects and engineers in general as it will explain the legal basis why claims by unregistered engineers and architects are unenforceable. This will necessarily involve this court in interpreting the provisions in the Architects Act 1967 and the Registration of Engineers Act 1967. If this court determines that the Architects Act 1967 and the Registration of Engineers Act 1967 expressly prohibit claims by unregistered corporate entities, then s. 24(a) of the Contracts Act 1950 will apply. The legal analysis in this scenario is rather straightforward and will merely involve applying the clear words of the Architects Act 1967 and the Registration of Engineers Act 1967 to the facts of the instant case.

However, if this court concludes that the Architects Act 1967 and the Registration of Engineers Act 1967 impliedly prohibits claims by unregistered corporate entities, then s. 24(b) of the Contracts Act 1950 will apply. In this scenario this court will have to discover the intention and purpose of the legislature when determining the scope and extent of the implied prohibition. In *Sagabumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong* [1998] 3 MLJ 151; at pp. 177-178 Peh Swee Chin FCJ said:

> Thus, I come to the conclusion that the said agreement is a contract or amounts inevitably to a contract to do an act forbidden or prohibited by s. 21 under the said statute.

> Such being the case, there is no need to go into the question (hereafter called 'the distinguishable question') of whether the said agreement is a contract prohibited impliedly by the said statute – on the distinguishable question, all the parties concerned have concentrated so much of their energies. Out of deference to so many arguments advanced, allow me to make just a few observations as follows on that distinguishable question.
>
> Where any contract is not a contract or does not amount inevitably to a contract to do an act forbidden by a statute, then, what in practice often triggers off the distinguishable question is, when one of the contracting parties have contravened some statutory requirement in the performance of the contract and one of the parties in court this time defends the action against him by raising this point of contravention of that statutory requirement. To determine this distinguishable question, it then becomes a matter of trying to discover the intention of the legislature by the interpretation of the statute, almost always by employing, as a major rule of interpretation, along with other rules, the rule of purposive approach as explained and adopted by Lord Diplock in *Kammins Ballrooms Co. Ltd v. Zenith Instruments (Torquay) Ltd* [1970] 2 All ER 871.

Whichever scenario this court accepts in the final analysis it will have important repercussions in this instant case as well as on the engineering and architectural profession in general as it will judicially explain the express or implied prohibition on the recovery of fees in the Architects Act 1967 and the Registration of Engineers Act 1967. Hence, the questions in the plaintiff's originating summons, by raising the issue of the legal basis of the illegality of the first defendant's claims for fees, clearly raise a serious point of law for argument in this court.

The point of law raised by the various questions in the plaintiff's originating summons goes to the core of the first defendant's claim in the arbitration proceedings. If this court decides that the first defendant's claims for fees or remuneration for engineering and architectural services are not maintainable because it is not registered under the Architects Act 1967 and the Registration of Engineers Act 1967, then this will mean that the first defendant's claim in the arbitration proceedings must be dismissed. It is clear that the point of law at issue in the present originating summons is raised by the plaintiff *bona fide* and without ulterior motive. At a very early stage of the arbitration proceedings in October 1998, the plaintiff requested the arbitrator to state a case pursuant to s. 22 of the Arbitration Act 1952 on the issue of whether the first defendant's claims for fees could be maintained. When the second defendant refused to state a case for the decision of the High Court on this issue, the plaintiff informed him by letter that it intended to have this issue determined by the High Court on a case stated application at the appropriate time. The plaintiff made the present application soon after the close of evidence in the arbitration proceedings. This was the most appropriate time to make this

application as a proper determination of the point of law raised by the questions in the originating summons can only be made on findings of fact based on all the evidence in the arbitration proceedings. It can be seen that the plaintiff has always been consistent from the early stages of the arbitration proceedings that it wished the question of the legality of the first defendant's claims to be determined by the High Court on a case stated application. I am of the view that the plaintiff has fulfilled the requirements of s. 22 of the Arbitration Act 1952. In particular:

(a) the questions of law set out in the originating summons raise a clear and important point of law on the legality of the first defendant's claims for fees in the arbitration proceedings;

(b) although there is case law to say that the first defendant's claims for fees cannot be maintained, the courts have not been clear on which provision in s. 24 of the Contracts Act 1950 prohibits such a claim. The basis of this prohibition is a matter that is open to serious argument and should be resolved by the High Court. This issue also involves matters of public policy that are best resolved by the High Court and not left to be decided by a single arbitrator;

(c) the resolution of this point of law is important for the arbitration proceedings. If this court decides that the first defendant's claim for fees cannot be maintained, then the first defendant's claims in the arbitration proceedings must necessarily fail;

(d) the point of law raised by the questions in the originating summons is raised *bona fide*. The plaintiff always maintained as early as 1998 (even before the hearing of evidence in the arbitration proceedings) that this point of law on the legality of the first defendant's claims should be a matter to be determined by the High Court on a case stated application pursuant to s. 22 of the Arbitration Act 1952.

For those stated reasons I grant order in terms of the originating summons in encl. (11) and summons-in-chambers in encl. (5) is allowed with costs.